No. 21204

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT B. BRADFORD, *et al.*,

Appellants,

vs.

MAC L. SHERWOOD, *et al.*,

Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANTS' OPENING BRIEF.

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Introductory Statement.

This is an action to enjoin members of the California State Highway Commission and the Director of Public Works from proceeding in a state condemnation suit to acquire appellees' property for freeway purposes. It is claimed that the taking is in excess of the right-of-way needed and that insofar as a state statute permits such taking to avoid severance damage, such taking is unconstitutional.

Appellees had previously made the same contentions in the state court, but lost at an interim hearing to determine the right to take and its extent. Dissatisfied with the state ruling appellees sought to relitigate the same issue in the District Court by way of injunctive

relief. Because an interpretation of state law preceded the federal question, the trial court abstained to the extent of returning the parties to the state appellate courts to obtain a determination of state statutes by way of an extraordinary writ. No writ issued and no determination by the state appellate courts was forthcoming, whereupon the federal court resumed jurisdiction, interpreted the state law, and found that the appellees had exhausted their state remedies.

The District Court lacked the power to continue in force the temporary injunction staying state court proceedings in violation of 28 U.S.C. 2283 for the purpose of relitigating the previously tried issue.

Additionally, the court below erroneously found as a matter of law that appellees had exhausted their state judicial remedies by virtue of the denial of the writ. There remains the unexhausted remedy of appeal from the condemnation judgment which adequately protects title to the property.

Jurisdictional Statement.

The Court's jurisdiction of this appeal is based on 28 U.S.C. 1292(a)(1).

Statement of the Case.

Eminent domain proceedings were commenced on August 20, 1963 in the state court to acquire all of the property known herein as Parcel 9 for freeway purposes as authorized by a condemnation resolution passed by the defendant commissioners. In that action appellees' predecessors in interest contended that public use did not require the taking of all of Parcel 9 for the freeway. In view of this contention the state court

at a pretrial conference ordered the trial of the public use issue to be heard prior to the jury trial as to compensation.

The public use hearing was continued several times from May 8, 1964 to March 4, 1965. During the interim appellees purchased Parcel 9, filed an answer and also contested public use. [C. T. 42, 43.][1]

On March 4, 1965 the state judge adopted the procedure suggested by appellees' counsel [C. T. 205] and decided the issue of public use on the basis of written briefs and judicial notice of the condemnation resolution. [C. T. 60, 61.] Rejecting appellees' contention the state court on April 5, 1965 ruled:

> "In the matter submitted on previously filed briefs, the court finds: plaintiff has the right and power to condem(n) all of Parcel 9." [C. T. 29.]

Subsequent to the ruling by the state judge but prior to the jury trial set for July 27, 1965, the appellees commenced this action in the District Court to enjoin the appellants, the director and the commissioners, from prosecuting the state court action to the extent such action seeks to take property in excess of the right-of-way for the freeway [C. T. 9, 10] and concurrently moved for a preliminary injunction to prevent the appellants from prosecuting the state condemnation proceeding. [C. T. 15.] The taking in excess of the right-of-way is claimed to be invalid under both federal and state constitutions [C. T. 8] and insofar as such taking is authorized by Section 104.1 of the California Streets and Highways Code the appellees seek to have it declared unconstitutional. [C. T. 9.]

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[1]C. T. refers to Clerk's Transcript.

Appellants opposed the motion for preliminary injunction and moved to dismiss. Because of the shortness of time before the jury trial in the state court the District Judge restrained appellants from proceeding to trial or taking any further action or proceedings in the state court while it considered its jurisdiction. [C. T. 105.]

By memorandum dated October 5 and order of October 8, 1965 the trial court found that jurisdiction was expressly authorized by 28 U.S.C. 1331, continued the temporary restraint in force until further order to give appellees an opportunity to proceed in the state courts through extraordinary writ proceedings [C. T. 141, 142] apparently in recognition of the abstention doctrine.

The appellees were unsuccessful in their attempt to obtain a writ of prohibition in the state appellate courts and requested the District Court to resume the exercise of its jurisdiction. [C. T. 153, 154.]

Subsequently on May 12, 1965 the District Court resumed the exercise of its jurisdiction, found that the appellants had "exhausted" their state remedies (appeal deemed inadequate), and in effect continued the restraint imposed in October pending the exhaustion of extraordinary writ proceedings. [C. T. 229, 230.] This order also contained a ruling by the trial judge that Section 104.1 which authorizes the taking of excess land to avoid severance damages is unconstitutional under Article I, Section 14½ of the California Constitution, the very question which prompted the abstention initially.

Thereafter appellants appealed from the order of May 12, 1966.

Questions Presented.

1. Do Federal District Courts have the power to stay pending state condemnation proceedings while the property owners relitigate an interim ruling made in the latter forum in view of the anti-injunction statute, 28 U.S.C. 2283?

2. Where a claimant has not completely exhausted his state judicial remedies, but has been merely unsuccessful in obtaining extraordinary relief, is he entitled to equitable relief in the federal courts where a controlling question of state law is involved, and appellate review is available after judgment in the state courts?

Specification of Errors.

The District Court erred in:

1. Restraining appellants from proceeding to trial in a pending state condemnation action in violation of 28 U.S.C. 2283, by holding that 28 U.S.C. 1331 expressly authorized such restraint.
2. Concluding that appellees had exhausted their State judicial remedies by unsuccessful application for extraordinary writ.
3. Concluding that appellate review by the State Courts after a condemnation judgment is not an adequate remedy.

ARGUMENT.

Summary.

The trial court's orders raise two essential questions. The application of 28 U.S.C. 2283 (the anti-injunction statute) to 28 U.S.C. 1331 (the federal question statute) and the delicate federal-state relationship that results from their interpretation by the federal courts.

There is little doubt that eminent domain proceedings must proceed in an orderly manner free from unnecessary outside interference, whether that interference initiate from within the state or through the agencies of the Federal Government. It is also clear that in every condemnation proceeding there is the possibility of a constitutional issue under the Fifth and Fourteenth Amendments to the United States Constitution. It is recognized that the federal courts are the protectors of these constitutional guarantees even to the extent of reviewing the decisions of state courts in limited situations. However, the federal courts do not have concurrent jurisdiction with the state courts in condemnation proceedings (except in diversity cases) in spite of the original federal question jurisdiction.

Congress has recognized this difficult situation and has codified its solution in Section 2283 so as to preserve harmony between the two judicial systems. Where state condemnation proceedings are involved, the federal courts have strictly construed this section—and prohibited injunctive relief, even in the face of a constitutional attack on state court rulings.

The federal courts also have evolved a rule based on recognized equitable principles that requires an exhausting of state judicial remedies before injunctive re-

lief will be granted. This rule was ignored in the instant case. The appellees have an absolute right to appeal from any state judgment rendered. The effort required would be hardly more than that expended in this romp through the federal courts which has already delayed the condemnation action for 18 months.

The following authorities demonstrate conclusively that the orderly conduct of state judicial proceedings is preferred to the hasty interposition of the District Court and the added delay such action necessarily generates.

I.

Congress Has Prohibited the District Court From Staying Proceedings in the State Court Except in Certain Specified Cases Not Applicable Here.

The complaint and motion for injunctive relief are aimed at restraining a State condemnation proceeding on the grounds that an interim trial court ruling prior to judgment violated appellees' federal constitutional rights. The District Court enjoined appellants from proceeding to trial stating: "The jurisdiction of the Court having been expressly authorized by 28 U.S.C. 1331, the prohibitions of 28 U.S.C. 2283 do not apply."

The District Court misconceived both code sections.

Section 2283 of Title 28 U.S.C. provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by act of Congress, or where necessary in aid of its jurisdiction or to protect or effectuate its judgments."

There is no judgment to protect in the instant case nor does section 1331 *expressly* authorize an injunction.

The phrase "where necessary in aid of its jurisdiction" has previously been interpreted by the courts adverse to appellees' position. Of course if it were given a broad meaning the section would be a nullity. Therefore the courts have interpreted the phrase narrowly.

> "The phrase, 'where in aid of its jurisdiction', therefore, should be interpreted narrowly, in the direction of federal non-interference with orderly state proceedings. It is even questionable whether the phrase authorizes injunctions to protect jurisdiction of original actions. . . . In any event, it is not, as seems to be asserted here, a mandate to federal courts to hold the line against a possible state invasion of a theoretic concept of federal jurisdiction over a field of law supposedly the exclusive domain of federal courts.
>
> . . .
>
> Further, we think that the broad language of Section 2283 and the policy underlying it are against issuance of a federal injunction to stay state court proceedings even when the subject matter of an action, as federal courts see it, rests exclusively in the federal courts under federal statute."
>
> *T. Smith & Son, Inc. v. Williams* (1960), 275 F. 2d 397, 407.

In the *Williams* case above the state proceeding involved litigation thought to be within the *exclusive* province of the federal courts. Here the District Court's jurisdiction is not exclusive nor is it even concurrent as in diversity cases. Condemnation cases are the special reserve of state courts. (*Louisiana Power & Light Co. v. City of Thibodaux* (1959), 360 U.S. 25, 79 S. Ct. 1070, 3 L. Ed. 2d 1058). The federal courts may

not interfere in such proceedings by injunction even though there is a claimed constitutional violation. (*Baber v. Texas Utilities Co.* (1956), 228 F. 2d 665, 666).

The question of the scope of Section 2283 was before the Eighth Circuit in *Collins v. La Clede Gas Co.* (1956), 237 F. 2d 633 in substantially the same setting as the case at bar. There the property owner sought to stay state condemnation proceedings on the grounds the statute authorizing the acquisition was unconstitutional. The federal suit was filed after the order authorizing the condemnation was issued but before appellate proceedings in the state court were completed. The Court interpreted section 2283 as follows:

> "This court has had occasion to consider the question in the following cases: Evans v. St. Louis Housing Authority, 8 Cir., 226 F.2d 750; Norwood v. Parenteau, 8 Cir., 228 F.2d 148; and National Labor Relations Board v. Swift & Co., 8 Cir., 233 F.2d 226, 230. In National Labor Relations Board v. Swift & Co., supra, answering the contention that the exceptions contained in the statute might be supplemented by implied or judicial exception we said:
>
> > " 'The history, purpose and construction of section 2283 are fully considered by the Supreme Court in the Richman case, supra. The Court states that this enactment revised as well as codified its predecessor, former section 265 of the Judicial Code, and that by the enactment of section 2283 Congress "made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation."

> "'Hence, decisions, under the predecessor statute which appear to recognize implied exceptions to the statutory prohibitions need not be considered.'" (Emphasis by the Court.)
>
> "As the plaintiffs have not brought their case within any of the statutory exceptions to 2283, Title 28 U.S.C.A., we think this fatal to their right to relief. . . ."

In the landmark case—*Amalgamated Clothing Workers of America v. Richman Bros. Co.* (1954), 348 U.S. 511, 75 S. Ct. 452, 99 L. Ed. 600 referred to in *Collins* and *Williams* the Supreme Court put to rest any lingering doubts that Section 2283 was merely a smoke screen against equitable jurisdiction. There a suit to enjoin a state injunction against peaceful picketing was predicated on 28 U.S.C. 1337 which confers original jurisdiction on federal courts over any civil action arising under any Act of Congress regulating interstate commerce (Taft-Hartley Act).

Justice Frankfurter analyzed Section 2283 as follows:

> "In lieu of the bankruptcy exception of § 265, Congress substituted a generalized phrase covering all exceptions, such as that of the Interpleader Act, 28 U.S.C. § 2381, to be found in federal statutes. Two newly formulated exceptions to the general prohibition deal with problems of *judicial administration* which had earlier been the subject of the series of decisions dealt with in the Toucey Case.
>
> . . .
>
> This is not a statute conveying a broad general policy for appropriate ad hoc application. Legisla-

> tive policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions." (99 L. Ed. 607, 608.) (Emphasis added.)

Congress, therefore, intended the "aid of jurisdiction" exception to apply to those situations where parties attempted to relitigate pending federal case in state courts overruling *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 62 S. Ct. 139, 86 L. Ed. 100, 137 A.L.R. 967, and to prevent conflict where the Federal Courts had *previously* acquired jurisdiction.

The question of whether the exception was expanded to apply to *potential* jurisdiction as in 28 U.S.C. 1651 was also discussed by Justice Frankfurter in footnote 5, 99 L. Ed. at page 610:

> "In any event, it has never been authoritatively suggested that this example of injunctive aid to a potential jurisdiction, which finds roots in traditional concepts of the relationship between inferior and superior courts of the same judicial system, has any relevance where the offending action sought to be enjoined is insulated by two intervening and essentially unrelated systems, one of an administrative rather than judicial nature, the other the mainifestation of a distinct soveriegn authority."

The above cases establish beyond doubt that the District Court has no power to stay state condemnation proceedings even though the plaintiff invokes the original jurisdiction of the court by alleging that the statute authorizing the taking is a violation of the Fourteenth Amendment. In the case at bar appellees invoke the original jurisdiction of the District Court

claiming that the State statute authorizing "excess" taking to avoid severance damage is unconstitutional. This claim under Section 1331 does not automatically put to rest the prohibition of Section 2283 nor does it fall within its exceptions. To say that the requested injunction is in "aid of the jurisdiction" conferred by Section 1331 is to apply a bootstrap theory of jurisdiction without regard to clear Congressional meaning. This the courts have refused to do.

Rosso v. Puerto Rico (1964), 226 F. Supp. 688 is identical. There the District Court recognized the prohibition of Section 2283 and dismissed a complaint for injunctive relief based on a claim that property was not being acquired for a public use in a pending Commonwealth condemnation action.

In the trial court the appellees relied on certain dicta in *Progress Development Co. v. Mitchell* (1961), 286 F. 2d 222 which gave the impression that a state condemnation proceeding could be enjoined under the equitable provisions of the Civil Rights Act (28 U.S.C. 1343 and 42 U.S.C. 1983). This proposition was carefully analyzed by the court in *Green Street Assn. v. Daley* (1966), 250 F. Supp. 139 at page 145:

> "The plaintiffs maintain that Section 2283 is merely the hands-off doctrine referred to as 'comity' and that no proceedings have yet been filed in the State courts. Although the court in *Harrison-Halsted* did not consider this section. the court in *Progress Development* did. In *Progress Development* (286 F.2d 222) it was said, at 232:
>
> '. . . [W]e find nothing in the language of Title 28 U.S.C.A. §2283 which precludes the district

> court from granting equitable relief against defendants Park Board and District in the proper circumstances. This equitable power is also authorized by 28 U.S.C.A. § 1343.'
>
> "However, an examination of the case reveals that proper circumstances are exceptional and that ordinarily no injunction will issue to restrain condemnation where the issue can be raised in the State Court. . . . Further, not even in the *Progress Development* case was the cause remanded to enjoin the State condemnation action which is the relief here sought."

The court went on to deny injunctive relief in the *Daley* case based on the prohibition of Section 2283.

A similar contention was made in the civil rights case of *Sexton v. Barry* (1956), 233 F. 2d 220 an action to enjoin state probate proceedings as violative of the Fourteenth Amendment. The Court's reply at page 224:

> "Appellants' application for injunction plainly does not fall within the first exception of Section 2283, for such relief is not expressly authorized by Act of Congress."

And further at page 226:

> "The Act (Civil Rights) does not create an exception to the general principle that a decision of the state court may not be reviewed by bill in equity in a federal court."

Subsequently, the Seventh Circuit in *Smith v. Village of Lansing* (1957), 241 F. 2d 856 was also asked to in-

terpret the Civil Rights Act as an express authorization sanctioning injunctive relief. The Court refused to distort the plain meaning of Congress at page 859:

> "Title 28 U.S.C. § 2283 prohibits United States Courts from issuing injunctions to stay proceedings in a state court except as expressly authorized by Act of Congress, or where in and of its jurisdiction, or to protect or effectuate its judgments. We hold there is nothing in the Civil Rights Act, Title 42 U.S.C. § 1981 et seq., that suspends or modifies this statute."

Title 28 U.S.C. 1343 is of no comfort to appellees. Even if applicable as a source of original jurisdiction, it is not express authority to interrupt state proceedings, nor does it bring into play the "aid to jurisdiction" exception. (*Sexton v. Barry,* 233 F. 2d at p. 224.)

Cincinnati v. Vester (1929), 33 F. 2d 242 was the only case cited by appellees which enjoined a state condemnation proceeding to determine the constitutionality of the taking. The case was decided prior to the enactment of Section 2283, and no contention was made by the parties that the injunction proceedings violated former Section 265 of the Judicial Code. In light of this circumstance the case is not authority to ignore the prohibition contained in Section 2283.

The granting and continuing of the injunction halting the state condemnation proceeding is clearly violative of Congressional mandate. It must be dissolved.

II.

Appellees Have an Adequate Remedy at Law by Way of Appeal From the State Judgment Which They Have Failed to Exhaust.

It is axiomatic that if a claimant has an adequate remedy at law equity will deny him injunctive relief. The concept of adequate remedy at law includes judicial remedy as well as administrative remedies. Hence, the federal rule that the claimant must exhaust state judicial remedies prior to equitable relief for the deprivation of federal constitutional rights.

Thibodo v. U. S. (1951), 187 F. 2d 249, 256;

Harrison-Halsted Community Group, Inc. v. Housing & Home Finance Agency (1962), 310 F. 2d 99;

Equitable Life Assurance Society v. West (1939), 102 F. 2d 10.

Appellees by legal argument only (no affidavits having been presented) contended that appeal after judgment was not an adequate remedy because of the expenses required, the possibility that the state might take possession of the property pending the litigation [C. T. 29], the delay incident to appellate process [C. T. 29, 30], and the likelihood of unconstitutional treatment at the hands of the California courts. [C. T. 20.]

A. California Courts Are Guardians of Constitutional Rights.

Taking the last of these contentions because of its misconceived clairvoyance[2] and ease of disposition it

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[2]During the preparation of this brief an opinion by the California Court of Appeal, Fifth Appellate District, was filed on Jan-

(This footnote is continued on the next page)

can readily be seen that California courts have as much respect for constitutional protections as other courts. It is obvious beyond cavil that California courts are guardians of due process under the Federal as well as State Constitutions.

Gray v. Hull (1928), 203 Cal. 306, 317-318;
Mulkey v. Reitman (1966), 64 Cal. 2d 529.

Indeed, the very statute (Streets and Highways Code 104.1) which appellees attack as unconstitutional here was not interpreted by the case which they point to as disregarding constitutional rights, namely, *People v. Lagiss,* 223 Cal. App. 2d 23. [C. T. 30.] The only state statute there involved was section 104.3.

B. The Delay and Expense Incident to Appellate Review Do Not Constitute Irreparable Harm so as to Render This Remedy Inadequate.

The appellees complain that the slowness of the appellate procedure and the expense in pursuit thereof is peculiar to them. It is not. Every litigant who is unsuccessful in the lower courts labors under this burden, as well as the successful.

Is the time-consuming process of appeal from state judgments sufficient to invoke the equitable jurisdiction of the federal court to correct a claimed constitutional error? This question was answered by the Supreme Court in *Georgia v. Chattanooga* (1924), 264 U.S. 472, 44 S. Ct. 369 in the following manner:

> "Its (appellants') contention that the requisite power to condemn has not been delegated to the

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uary 23, 1967 in the case of *People, etc. v. The Superior Court of Merced County,* holding section 104.1 of the Streets and Highways Code vague and an invalid delegation of power. The case is not final. Counsel for appellants plan to petition for rehearing.

> city involves a consideration of the meaning and proper application of the laws of Tennessee and it is especially appropriate that Tennessee courts shall first decide that question. . . . If the decisions of that court shall deny to Georgia any rights secured to it by the constitutional laws of the United States, the case may be brought here for re-examination and review. . . ." (264 U.S. at pages 483, 484.)

Thus appeal, even to the highest Court in the land with all its attendant delay, is an adequate remedy to correct constitutional wrongs.[3] Indeed, its very existence forecloses federal equitable jurisdiction.

> "The condemnation proceedings now pending in the state court are vigorously attacked by bill for injunction in the District Court as violative of due process of law and contrary to the Fourteenth Amendment.
>
> "The plain answer is that the state courts are as firmly bound by the Constitution of the United States as is this Court, and appellants' forum for the enforcement of any constitutional rights that may have been violated is in the Texas state courts with the right of ultimate determination by the Supreme Court of the United States. . . ." (*Baber v. Texas Utilities Co.* (1956), 228 F. 2d at p. 666).

In accord, *Combs v. Illinois State Highway Comm.* (1955), 128 F. Supp. 305, an action before a three

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[3]Delay is, of course, a relative term in the judicial process. This case has been pending in the District Court since June 18, 1965. The condemnation case has been pending in the state court since August 20, 1963, due to the prior delay caused by the condemnees in that action and the injunction here.

judge court to declare the Tollway legislation unconstitutional where no state court action was pending.

In *Gulf Oil Corp. v. Corp. Commissioner of Oklahoma* (1956), 147 F. Supp. 640, a three judge court rejected Gulf's contention that appeal to the Oklahoma Supreme Court was not adequate. Even though Gulf may have exhausted its administrative remedies, it was required to exhaust judicial remedies prior to the acceptance of equitable jurisdiction by the federal court.

The underlying policy of the above cases can best be illustrated by Justice Frankfurter (*Amalgamated C. W. of A. v. Richman Bros., supra,* 99 L. Ed. at page 609):

> "The assumption upon which the argument proceeds is that federal rights will not be adequately protected in the state courts, and the 'gap' complained of is impatience with the appellate process if state courts go wrong. But during more than half of our history Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court. With limited exceptions, it was not until 1875 that the lower federal courts were given general jurisdiction over federal questions.
>
> . . .
>
> "Misapplication of this Court's opinions is not confined to the state courts, nor are delays in litigation peculiar to them. To permit the federal courts to interfere, as a matter of judicial notions of policy, may add to the number of courts which pass on a controversy before the rightful forum for its settlement is established. A district court's assertion of equity power or its denial may in turn

> give rise to appellate review on this collateral issue. There may also be added an element of federal-state competition and conflict which may be trusted to be exploited and to complicate, not simplify, existing difficulties."

The instant case is proof of the penetrating incite above described. The interposition of the federal court in the state proceedings has served to complicate rather than simplify each party's search for a solution to the problem of state statutory construction within federal and state constitutional framework. We now have two differing interpretations of the same statute and also an appeal on a collateral issue. The competition has already been exploited to the extent of giving birth to two conflicting trial court rulings on the same issue.

The complaint that pursuit of the judicial remedy of appeal will result in unrecoverable expenses was quickly disposed of by the Supreme Court in *Petroleum Exploration v. Public Service Commission of Kentucky* (1938), 304 U.S. 209, 58 S. Ct. 834, 82 L. Ed. 1294 at page 1303:

> "The situation is still controlled by the abiding and fundamental principle . . . that the expense and annoyance of litigation is a 'part of the social burden of living under government.' "

and further at page 1304:

> "When the only ground for interfering with state procedure is the cost of preparing for a hearing, there is no occasion for equitable relief."

If this were not the rule the detrimental consequences would be obvious, for every remedy involves a cost.

C. Appellees' Title Is Fully Protected Pending Appeal in the California Appellate Courts Even Though the State May Take Possession of the Right-of-Way for Highway Construction.

Apparently the court below was unduly fearful that state appellate review was too late to be beneficial to appellees, as demonstrated by the following characterization:

> "Appellate review available in the State Forum will be after the decision of the case on the merits, at which time their property will have been condemned so that they will in effect be in the position of one attempting to lock the barn door after the horse is gone." [C. T. 140, see also C. T. 229-230.]

This concern apparently developed from appellees' argument that the condemnor has the power to take possession of the property pending litigation in the state court, and that the litigation itself constitutes a "cloud" on the entire property. [C. T. 29.]

It is true that the condemnor may take possession of the *right-of-way* before judgment and final order. Code of Civil Procedure, Section 1243.5. But this section does not affect lands outside the right-ofway. Sections 1254 and 1257 also permit possession after judgment pending appeal upon the posting of adequate security so as not to retard the contemplated improvement. Orders based on the latter sections are appealable. (*San Francisco Unified School District v. Hong Mow* [1954], 123 Cal. App. 2d 668) and are made to safeguard the property owner. (*People v. Loop* [1958], 161 Cal. App. 2d 466, 473.)

Furthermore, where the right to take is contested possession may be denied pending appeal, so long as the construction of the highway is not retarded. (*Housing Authority of Oakland v. Superior Court* [1941], 18 Cal. 2d 336.) The lands which appellees claim are outside the right-of-way would not be included within the order of possession.

Finally, an appeal in a condemnation case stays satisfaction of judgment so that legal title does not vest in the condemnor until the appellate process is complete and judgment is final. (*City of Los Angeles v. Oliver* [1930], 110 Cal. App. 248, 258.)

Appellees could not possibly be prejudiced by going to judgment and pursuing appellate review. California statutory safeguards protect them every step along the way. The trial court's conclusion that appellees' property will have been condemned so that they have no appellate remedy misconceives California law. In light of the above protections appellate review is adequate to foreclose equitable relief here.

D. Discretionary Application of the Abstention Doctrine Is No Substitute for the Rule Which Requires That Claimants Exhaust State Judicial Remedies Before Invoking the Equitable Jurisdiction of the District Court.

The District Court by analogy to the case of *Allegheny County v. Frank Mashuda Co.* (1959), 360 U.S. 185, 79 S. Ct. 1060, 3 L. Ed. 2d 1163, abstained from exercising its jurisdiction pending submission of a previously uninterpreted statute (104.1) and state constitutional provision (Art. I, Sec. 14½) to the state courts. The court below confused the abstention doctrine with the equitable rule requiring the claimant to exhaust his state judicial remedies. [C. T. 141.]

The abstention doctrine does come into play when the interpretation of a state statute precedent to the federal question is involved. In applicable cases the District Court has discretion to abstain even though it has jurisdiction.

Interestingly, the doctrine achieved fruition in the *Mashuda* case, *supra,* and *Louisiana Power and Light Co. v. City of Thibadoux* (1959), 360 U.S. 25, 79 S. Ct. 1070, 3 L. Ed. 2d 1058, decided on the same day. Both cases were diversity condemnation proceedings over which the District Court has original concurrent jurisdiction with state courts. Neither case involved an injunction to stay state court proceedings. (In *Mashuda,* injunction was abandoned by the owner.)

In *Thibadoux* the Supreme Court *required* not merely sanctioned the District Courts' "exercise of their discretonary power to stay (their own) proceedings pending the submission of the state determination" where state law is unclear. (3 L. Ed. 2d 1061.)

However, in *Mashuda,* the state law was not subject to differing interpretations regarding public use as presented, and the District Court was required to exercise its diversity jurisdiction, but not its equitable power to stay state condemnation proceedings. (360 U.S. at p. 190.)

Abstention then as the term has been used in these recent decisions signifies that a federal court may either decline or postpone to exercise its jurisdiction where a case involves a controlling question of state law. It does not supplant the traditional concept that a claimant must exhaust his state judicial remedies before he may apply for *equitable* relief. Nor does it justify a discre-

tionary application of the doctrine as a means to avoid the mandate of 28 U.S.C. 2283.

In the instant case the District Court should have dismissed rather than employ the procedure suggested in the *Thibadoux* case which is reserved for diversity cases where no action is pending in the state court and no injunction is requested.

Appellants submit that invoking the abstention procedure adopted by the trial court is no substitute for complete appellate review in the state courts and violates fundamental policies inherent in federal-state relationships.

Conclusion.

The action by the District Court herein clearly violates Congressional prohibitions and equitable principles. Section 2283, referred to as a "pillar of federalism", is completely emasculated by the strained interpretation advocated by appellees and adopted by the trial court. To contend that the preliminary injunction is in "aid of jurisdiction" is to render the statute meaningless.

An acceptance of such a broad interpretation of the exception would destroy the very purpose of the legislation, namely, a Congressional desire to avoid friction between the federal government and the states which necessarily results from the intrusion of federal authority into the orderly process of the states' judicial function.

The judicial power of the District Courts is a limited one. It should not be expanded beyond the intent of the legislation creating such power.

Finally, apart from the anti-injunction statute, appellees have failed to show that they are entitled to equitable relief. Their naked assertions that appellate review in the state courts is slow, late, expensive and fruitless are specious and contrary to announced California statutory and decisional law which is designed to protect the legitimate rights of the property owner in condemnation proceedings. Appellees have an adequate remedy of appellate review in the state courts.

What they seek here is to replace the California appellate courts with the District Court as a court of review passing on claimed errors of the state trial courts. This purpose was partially accomplished by the issuance and continuance of the preliminary injunction below.

Appellants submit that sitting as a board of review to correct errors of the state trial court is not the function of the District Court. The means to accomplish this function should be stopped by dissolution of the preliminary injunction and dismissal of the action.

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ANTHONY J. RUFFOLO